Supreme Court, U.S.
FILED
APR 17 1997
OFFICE OF THE CLERK

No. 96-1486

In The

Supreme Court of the United States

October Term, 1996

COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

vs.

ESTATE OF ROSE D'AMBROSIO, Deceased,
VITA D'AMBROSIO, Executrix,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

JAY J. FREIREICH
Counsel of Record
HARVEY R. POE
LAURENCE E. FUNDLER
Attorneys for Respondent
256 Columbia Turnpike
Columbia Commons - Suite 202
Florham Park, New Jersey 07932
(201) 966-2770

70947 (800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21 Lutz Appellate Services, inc.

TABLE OF CONTENTS

	Page
Statement of the Case	1
Reasons for Denying the Writ	6
I. The Third Circuit's Decision In This Case Is Correct.	7
II. Other Reasons Which Militate Against Granting Certiorari.	11
A. Congress has enacted new laws effectively eliminating the sale of a remainder interest transaction in estate planning.	11
B. The issue in the instant case is not frequently litigated.	13
C. The instant case was the first of its kind to reach a Federal circuit court, and accordingly, there is no conflict among the circuits.	14
Conclusion	16

TABLE OF CITATIONS

Cases Cited:

Burnet v. Harmel, 287 U.S. 103 (1932)	9
Estate of Gregory v. Commissioner, 39 T.C. 1012 (1963)	7, 13

Contents

Page

Gradow v. United States, 11 Cl. Ct. 808 (1987), *aff'd for the reasons set forth by the claims court*, 897 F.2d 516 (Fed. Cir. 1990) 7, 13, 14, 15

Pittman v. United States, 878 F. Supp. 833 (E.D.N.C. 1994) 7

Simpson v. United States, 252 U.S. 547 (1920) 4

United States v. Allen, 293 F.2d 916 (10th Cir. 1961) 7, 9, 13, 14, 15

United States v. Irvine and First Trust Nat. Assoc., 511 U.S. 224 (1994) 9

United States v. Past, 347 F.2d 7 (9th Cir. 1965) 7, 13, 14, 15

Statutes Cited:

26 U.S.C. § 2031(a) 2

26 U.S.C. § 2033 2

26 U.S.C. § 2036(a) ..... *passim*

26 U.S.C. § 2036(c) 11, 12

26 U.S.C. § 2701, *et seq.* 5, 11, 12, 13

26 U.S.C. § 2702 ..... 12, 13

Contents

	Page
26 U.S.C. § 2702(a)(2)(A)	12
26 U.S.C. § 2703	12
26 U.S.C. § 2704	12
OBRA, '87, P.L. 100-203, 12/22/87	11
OBRA, '90, P.L. 101-508, 11/5/90	11
New York Estate, Powers and Trust Laws:	
§ 6-3.1, *et seq.*	9
§ 6-4.1, *et seq.*	9
§ 6-5.1, *et seq.*	9
Other Authorities Cited:	
Treas. Reg. § 20.2036-1	8, 9, 10
Treas. Reg. § 25.2702-4(a)	12

STATEMENT OF THE CASE

This case involves the correct application of the parenthetical exception contained in 26 U.S.C. § 2036(a)[1] ("§ 2036(a)") where a transferor sells, not a fee interest in the subject property, but only the remainder interest in the property.

Section 2036(a) is designed to prevent an individual from avoiding the estate tax by transferring away his property gratuitously, or for a fraction of its fair market value, all the while retaining the use, enjoyment and benefit thereof, including

1. 26 U.S.C. § 2036(a) provides as follows:

> § 2036. Transfers with retained life estate.
>
> (a) General rule.
>
> The value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death —
>
> (1) The possession or enjoyment of, or the right to the income from, the property; or
>
> (2) The right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom.

All section references contained in this brief are to the Internal Revenue Code of 1986, as amended, unless otherwise specified.

a life estate therein. The parenthetical exception contained in § 2036(a) excludes from its application the lifetime transfer of property, or lifetime transfer of an interest in property, for adequate and full consideration. Such transfers are excluded because the transferor has received in exchange for the transferred property, or transferred interest in property, the equivalent value in money or money's worth. Accordingly, the transferor has merely changed the type or nature of the property making up his potential gross estate[2], but has not reduced his potential gross estate as a result of the transfer.

Specifically, this case involves the application of the parenthetical exception contained in § 2036(a) to a properly structured sale of the remainder interest in shares of corporate stock, in exchange for consideration exactly equivalent in value (in money or money's worth) to the value of the remainder interest (the remainder interest being the only property interest transferred). Prior to the sale, the transferor owns the fee interest of the shares of stock. After the sale, the transferor owns the value of the retained life estate interest in the shares of stock and the value of the consideration received in exchange for the sale of the remainder interest. Together, the proceeds from the sale of the remainder interest plus the retained life estate interest, and the benefits flowing therefrom, equal the full value of the

---

2. The concept of "potential" gross estate is important to the issue in this case. The value of a gross estate is determined as of the date of death. 26 U.S.C. §§ 2031(a), 2033. Section 2036(a) is directed at lifetime transfers and is designed to prevent an individual from artificially depleting his potential gross estate. The focal point of a § 2036(a) analysis must be at the time of the subject transfer, and must consider whether the transferor's potential gross estate has been depleted (as of the transfer date) in contravention of § 2036(a). As will be discussed in more detail, *infra*, a properly structured sale of a remainder interest transaction has no depletive effect on the transferor's potential gross estate. Aptly stated by the Third Circuit, ". . . it is difficult to fathom either the tax court's or the Commissioner's concerns about the 'abusiveness' of this transaction." (Appendix of Petition ("Pet. App.") at 14a).

underlying subject stock. The transferor's potential gross estate after the sale has not been reduced; the transferor merely changed the nature of his property ownership (just the same as if the transferor sold the shares of stock outright and received cash in exchange; her potential gross estate after the sale has not changed as a result of the sale).

Had the Decedent survived until her life expectancy under the mortality tables and invested the annuity wisely, the amount included in the Decedent's gross estate from the sale of the remainder interest would have equalled the fair market value of her shares of stock at the time of the transaction. Furthermore, should the Decedent have lived past her life expectancy, said amount would be in excess of the shares' fair market value.

1. The relevant facts in this case, which were stipulated by the parties before the United States Tax Court, are as follows. On September 1, 1987, Rose D'Ambrosio ("Decedent") owned four hundred seventy (470) shares of preferred stock of Vaparo, Inc. ("Vaparo"), a closely held corporation organized under the laws of the State of New York. On September 1, 1987, the Decedent sold her remainder interest in her Vaparo preferred stock to Vaparo pursuant to a redemption agreement. In exchange for the sale, the Decedent received a private lifetime annuity, with appropriate annual payments in the amount of Two Hundred Ninety Six Thousand Thirty Nine ($296,039) Dollars. In addition to the lifetime annuity received from the sale, the Decedent retained the income interest of the Vaparo preferred stock for her life.

The fair market value of the four hundred seventy (470) shares of preferred stock of Vaparo, at the time of the sale of the Decedent's remainder interest therein, was Two Million Three Hundred Fifty Thousand ($2,350,000) Dollars. Using the Internal Revenue Service ("IRS") tables for valuing interests in

property, the remainder interest in the Decedent's Vaparo preferred stock was determined to have a fair market value of One Million Three Hundred Twenty Four Thousand Fourteen ($1,324,014) Dollars at the time of its sale. In addition, the Decedent's lifetime annuity which was received in exchange for the sale of the remainder interest was calculated to have a fair market value exactly equivalent to the remainder interest ($1,324,014).

The parties agreed by Stipulation before the Tax Court that the fair market value of the Decedent's four hundred seventy (470) shares of Vaparo preferred stock, the remainder interest therein, and the Decedent's lifetime annuity, were all correctly computed. In addition, the parties agreed by Stipulation before the Tax Court that the life expectancy of the Decedent, all valuation factors used in determining the fair market value of the property interests at issue and the annual payments under the Decedent's lifetime annuity, were all computed correctly using the IRS actuarial and valuation tables.[3]

---

3. The IRS has prescribed and encouraged the use of extensive and detailed tables in order to determine the value of interests in property such as a remainder interest, a life estate, and the present value of an annuity agreement. These tables are an integral and necessary method of determining valuations for purposes of the administration of the Internal Revenue Code. This Court has long accepted this method of valuing property interests. *Simpson v. United States*, 252 U.S. 547 (1920). The value of the remainder interest of the Vaparo preferred stock and the present value of the lifetime annuity agreement, both of which were stipulated to be correctly computed, were determined by use of the very tables that the IRS has prescribed for just that purpose.

This Court should not be misguided by the mischaracterization of the use of the word "hypothetical" in the Petition of the Commissioner of Internal Revenue. (Petition "Pet." at 5 & n.2). The Commissioner heavily relies upon use of the IRS valuation tables in the administration of the Internal Revenue Code, and she has stipulated that the remainder interest of the Vaparo preferred stock was correctly valued and the annuity (based on the value of the remainder interest) was correctly computed, using her valuation tables. (Pet. App. at 2a).

2. The issue presented in this case is whether the sale of the Decedent's remainder interest in her Vaparo preferred stock in exchange for the lifetime annuity was for an adequate and full consideration so as to satisfy the parenthetical exception contained in § 2036(a)[4]. The resolution of this issue turns upon whether the adequate and full consideration test for purposes of the parenthetical exception of § 2036(a) is to be measured against the full value of the Vaparo preferred stock, or whether it is to be measured against the value of the remainder interest in the Vaparo preferred stock, as that was the only property interest transferred in the exchange.

3. The Decedent died on May 25, 1990, and her Estate timely filed a Federal estate tax return, Form 706. On February 15, 1994, the Commissioner of Internal Revenue ("Commissioner") mailed a notice of deficiency to the Estate of the Decedent ("Estate") alleging, *inter alia*, that the aggregate fair market value of the Vaparo preferred stock, less the total payments actually received under the annuity, is includible in the Decedent's gross estate[5]. The Estate filed a timely petition to the United States Tax Court regarding this issue.

---

4. In 1990, Congress enacted the body of law found at 26 U.S.C. § 2701, *et seq.*, commonly known as "Chapter 14". Although the effect of the enactment of Chapter 14 to the sale of remainder interest transaction shall be discussed in more detail, *infra*, suffice it to say that Chapter 14 was designed to, and does address the estate and gift tax implications of the transaction at issue in the instant case. Chapter 14 does not apply to the Decedent's sale of her remainder interest in her Vaparo preferred stock because the sale was completed prior to the effective date of Chapter 14.

5. The Commissioner's notice of deficiency included the fair market value of the Vaparo preferred stock, less the amount of actual payments received under the lifetime annuity, in the Decedent's gross estate. However, the Commissioner stipulated in the Tax Court that for purposes of inclusion in the gross estate, the value of the Vaparo preferred stock should be reduced by the full value of the lifetime annuity as determined under the IRS valuation tables.

The Tax Court, blindly following a line of unpersuasive cases with inapposite facts to the instant case, determined that in order for the Decedent to have satisfied the adequate and full consideration test of § 2036(a), she would have had to receive consideration equal to the full value of the Vaparo preferred stock, even though she only sold the remainder interest (retaining the life income interest). In a well reasoned decision, the United States Court of Appeals for the Third Circuit reversed the decision of the Tax Court concluding that the Tax Court erred when it determined that the consideration received by the Decedent for her remainder interest was not adequate and full under § 2036(a). The Commissioner petitions for a writ of certiorari asking this Court to review the Third Circuit's decision.

REASONS FOR DENYING THE WRIT

The decision of the Third Circuit was correct and does not conflict with any decision of this Court or another court of appeals. This case does not present any legal question of general importance and the decision below is of no substantial practical significance. Review by this Court is not warranted.

The untenable position of the Commissioner is that even though the Decedent sold only the remainder interest in her Vaparo preferred stock, retaining a life income interest, § 2036(a) required that she receive consideration equal to the full value of the Vaparo preferred stock in order to satisfy the adequate and full consideration test of § 2036(a) This is a delusive interpretation of both the text of § 2036(a) and the intended application thereof by Congress. Furthermore, the Commissioner's position makes no practical sense. The Court should ask itself why a buyer would pay an amount equal to the full value of the Vaparo preferred stock, only to receive a portion or remainder interest therein?

I.

THE THIRD CIRCUIT'S DECISION IN THIS CASE IS CORRECT.

The Third Circuit, unlike the Tax Court, did not blindly follow the line of cases cited in support of the Commissioner's position on this issue[6]. Instead, the Third Circuit scrutinized the facts and application of law in each case, in order to determine their precedential value. With an eye towards a well reasoned decision, the Third Circuit correctly concluded that "these cases [are] either inapposite or unpersuasive . . ."[7] (Pet. App. at 5a).

The Third Circuit, thus turned its attention to the clear language of the relevant portions of § 2036(a). (Pet. App. at 11a). The statute reads, in pertinent part:

> The value of the gross estate shall include the value of all property *to the extent of any interest therein* of which the decedent has at any time made a transfer (except in case of a

---

6. The line of cases that have been cited as support for the position of the Commissioner is as follows: *Gradow v. United States*, 11 Cl. Ct. 808 (1987), *aff'd for the reasons set forth by the claims court*, 897 F.2d 516 (Fed. Cir. 1990); *United States v. Past*, 347 F.2d 7 (9th Cir. 1965); *Estate of Gregory v. Commissioner*, 39 T.C. 1012 (1963); and *United States v. Allen*, 293 F.2d 916 (10th Cir. 1961). Other, more recent cases have been proffered as support for the position of the Commissioner, none of which was decided by a Court of Appeals. *Cf. Pittman v. United States*, 878 F. Supp. 833 (E.D.N.C. 1994).

7. The Commissioner has attempted to show that there is a conflict among the circuits on the issue before this Court, referring to the cases of *Gradow*, *Past* and *Allen*. As will be discussed *infra*, this line of cases involves subject transactions that are significantly different than the properly structured sale of a remainder interest in the instant case, and accordingly they do not present a conflict among the circuits on the issue before this Court.

> bona fide sale for an adequate and full consideration in money or money's worth) . . . § 2036(a). (Emphasis added).

Correctly, and consistent with the unambiguous language of the statute, the Third Circuit held that "the clear import of the phrase 'to the extent of any interest therein' is that the gross estate shall include the value of the remainder interest, unless it was sold for adequate and fair consideration." (Pet. App. at 11a). The court found support for its interpretation in Treas. Reg. § 20.2036-1. (Pet. App. at 11a-12a).

The position of the Commissioner on this issue is motivated by a policy, other than that which can be elicited from the statute and its regulations. The Commissioner has attempted to create her own rules not found in the lucidity of the statute[8]. As the Third Circuit aptly expressed, "it is not our role to police the techniques of estate planning by determining, based upon our own policy views and perceptions, which transfers are abusive and which are not. That is properly the role of Congress . . ." (Pet. App. at 14a).

The Decedent was a resident of the State of New York where

---

8. The Commissioner argues that the "natural reading" of the text of § 2036(a) precludes acceptance of the Third Circuit's decision. (Pet. at 19). In her discussion, though, the Commissioner clearly has not accepted the "natural reading". Instead, she has taken the express text of § 2036(a) and substituted words therein to fit her "desired reading". (Pet. at 19-20). In particular, the last sentence of the first paragraph on page 20 of her Petition reads that it is the property ". . . *with respect* to which the decedent . . ." has made a transfer. This highlighted language does not appear in § 2036(a), and has been substituted by the Commissioner in place of the statutory language, ". . . property *to the extent* of any interest therein of which the decedent has at any time made a transfer . . ." The alteration of statutory text is not in accord with the "natural reading" of a statute, and, of course, will result in a different interpretation than as written by Congress.

a remainder interest is a legal estate in property, alienable in its own right. New York Estate, Powers and Trust Law § 6-3.1, *et seq.*, § 6-4.1, *et seq.* and § 6-5.1, *et seq.* It is a longstanding principle that the tax consequences of a transaction depends upon the nature of the property interest created under state law. *United States v. Irvine and First Trust Nat. Assoc.*, 511 U.S. 224 (1994); *Burnet v. Harmel*, 287 U.S. 103, 110 (1932). That the Decedent's transfer was only to the extent of her remainder interest in her Vaparo preferred stock is uncontroverted (and, in fact, conceded to by the Commissioner in the Tax Court). (Pet. App. at 2a). Thus, the value of the lifetime annuity being exactly equivalent to the fair market value of the remainder interest, the Decedent received adequate and full consideration for the ". . . interest [in the property] of which [she] has at any time made a transfer . . ." § 2036(a). The Commissioner's position is wholly irreconcilable with the text of § 2036(a).

The language of § 2036(a) is clear and unambiguous that, by virtue of the parenthetical exception, it excludes from its application any *interest* in property that was sold for an adequate and full consideration. Section 2036(a) contains no language that supports the position that the adequate and full consideration test is measured against the full value of property where a transferor sells only an interest in that property. It is illogical and unrealistic, for purposes of the parenthetical exception, to presume that the drafters of § 2036(a) intended for a buyer to pay an amount equal to the full value of property, only to receive a portion or partial interest of that property. The court in *Allen* is in accord with this position in recognizing that the consideration for the sale of the life estate in that case was adequate and that it would have been virtually impossible to sell the life estate for an amount equal to the full value of the underlying property. 293 F.2d at 917. Treas. Reg. § 20.2036-1 supports this conclusion by providing that, "A decedent's gross estate includes under § 2036 the value of any *interest* in property

transferred by the decedent . . . except to the extent that the *transfer* was for an adequate and full consideration in money or money's worth . . ." *Id.* (Emphasis added).

The clear language of § 2036(a) and Treas. Reg. § 20.2036-1 support that the parenthetical exception removes from the application of § 2036(a) any transferred interest, including a remainder interest, so long as the transfer was for an adequate and full consideration. The focus of the parenthetical exception contained in § 2036(a) is the transfer and the transferred interest. The value of the retained interest should be of no consequence where the consideration for the transferred interest is adequate and full.

To read the statute the way the Commissioner suggests, would require the words "any interest therein" as contained in § 2036(a) to have no meaning.

Beyond satisfaction of the textual requirements of § 2036(a), the economic reality connected with a properly structured sale of a remainder interest transaction is not inconsistent with the purpose and design of the statute, *e.g.*, to prevent the artificial depletion of an estate. The Third Circuit, in recognizing this, found it ". . . difficult to fathom either the tax court's or the Commissioner's concerns about 'abusiveness' of this transaction." (Pet. App. at 14a).

In the instant case, the Decedent received the lifetime annuity in exchange for her remainder interest in her Vaparo preferred stock and retained the life income interest in the stock. After the sale, the value of the Decedent's potential gross estate remained exactly the same. And, as the Third Circuit recognized, the Decedent's untimely death two and one-half years after the sale is of no concern because the "transferor of a remainder is equally likely to *outlive* the tables, in which case she would

collect more from her annuity, the gross estate would be correspondingly larger and the Commissioner would collect more tax revenue than if the remainder had never been transferred." (Pet. App. at 17a-18a).

After the submission of briefs and oral arguments made by both parties to this dispute, the Third Circuit reached the correct decision and issued a well reasoned opinion. Accordingly, this Court need not grant certiorari.

II.

OTHER REASONS WHICH MILITATE AGAINST GRANTING CERTIORARI.

A. Congress has enacted new laws effectively eliminating the sale of a remainder interest transaction in estate planning.

In 1987, Congress enacted 26 U.S.C. § 2036(c) ("§ 2036(c)"), to be effective for decedents dying after December 31, 1987, but not applying to transfers completed before December 18, 1987. OBRA, '87, P.L. 100-203, 12/22/87. In 1990, Congress retroactively repealed § 2036(c) to the date of its enactment, and in its place enacted 26 U.S.C. §§ 2701, *et seq.* ("Chapter 14"). OBRA, '90, P.L. 101-508, 11/5/90. Neither § 2036(c), nor Chapter 14 apply to the Decedent's sale of her remainder interest in the Vaparo preferred stock because the sale was completed on September 1, 1987, prior to the effective dates of those statutes[9].

---

9. As a result of the enactments of § 2036(c) and Chapter 14, practitioners would have been ill-advised to recommend a sale of remainder interest transaction after December 18, 1987. Accordingly, the issue in the instant case has limited application to transactions occurring at least nine or more years ago. Essentially, the issue has very little significance today.

Currently, Chapter 14 consists of special valuation rules which apply to sales of remainder interests, *inter alia*. Application of Chapter 14 results in current recognition and imposition of gift tax (instead of waiting until the transferor's death and including property in the transferor's gross estate for estate tax purposes). The Commissioner concedes that under Chapter 14 today, the Decedent's sale of her remainder interest in her Vaparo preferred stock would give rise to a current gift tax based upon the value of the retained life income interest, thereby making such a transaction wholly disadvantageous[10]. (Pet. at 21, n.13).

However, although footnote 13 of the Commissioner's Petition recognizes the enactment of § 2701, it fails to accurately represent the full breadth of Chapter 14 (which consists of §§ 2701, 2702, 2703 and 2704). In addition to § 2701's application to transfers involving interests in business entities, § 2702 addresses transfers into trusts and transfers like the one in the case at bar involving term interests[11], with respect to the

---

10. The estate tax and gift tax systems are unified taxing systems whereby the same tax is imposed upon lifetime gifts as is imposed upon property includible in a decedent's gross estate. Of course, this is an overly simplistic explanation of a complex taxing system. However, as conceded by the Commissioner, if the Decedent's sale was subject to the provisions of Chapter 14 pursuant to § 2702(a)(2)(A), the Decedent's retained life income interest would be given a value of zero, thereby resulting in gift tax (in the year of the transaction) imposed upon the full value of the Vaparo preferred stock, less the consideration received. Accordingly, it would be taxed in the same manner and amount (except for the timing of the tax) as if the Vaparo preferred stock was includible in the Decedent's gross estate. (Pet. at 21, n.13). Under former § 2036(c), the sale of remainder interest transaction was effectively prevented by including the full value of the interest transferred in the Decedent's estate for estate tax purposes.

11. A term interest is one of a series of successive interests in property, for example, a life estate and remainder interest. Treas. Reg. § 25.2702-4(a).

transfer of all types of property. In an attempt to misguide this Court, the Commissioner inappropriately limits her discussion of the broad application of Chapter 14 to only § 2701. Although the Commissioner is correct in that "[m]ost transfers of property with retained life estates obviously fall outside the scope of [§ 2701]" (Pet. at 22, n.13). However, she fails to also point out that most transfers would not escape the provisions of § 2702 which addresses transfers of all types of property[12]. The Commissioner's obvious attempt to magnify the importance of the issue in the instant case, with the advent of Chapter 14 in mind, falls short of the mark.

Chapter 14 has effectively eliminated most transfers with retained interests (including the sale of a remainder interest) in estate planning. Only under certain very limited conditions will Chapter 14 not apply to a transfer with a retained interest. However, as a result of the enactment of Chapter 14, the Decedent's sale of her remainder interest in her Vaparo preferred stock would not be a recommended transfer today. Thus, the precedential value of granting certiorari here is dubious at best.

B. The issue in the instant case is not frequently litigated.

The Commissioner's Petition states that the issue in this case is frequently litigated. (Pet. at 11). However, the three cases cited to demonstrate a conflict among the circuits (*Gradow*, *Past* and *Allen*) were decided in 1990, 1965 and 1961 respectively[13]. (*supra*, n.7). Even assuming, arguendo, that those cases involved

---

12. Chapter 14's focus is on transfers of property between family members. Nonfamilial transfers in the context of estate and gift tax planning is rather uncommon.

13. Other than *Gradow*, *Past* and *Allen*, *Gregory*, *supra*, (a Tax Court case) has been cited as precedence on the issue. *Gregory* was decided in 1963.

the same issue as in the instant case, it is a gross exaggeration to characterize three other circuit cases over a 26 year period as "frequently litigated." Furthermore, with the enactment of Chapter 14, the likelihood of this issue being litigated in the future is minimal. Accordingly, the infrequent and narrow implication of the issue here does not warrant certiorari to be granted by this Court.

C. The instant case was the first of its kind to reach a Federal circuit court, and accordingly, there is no conflict among the circuits.

The Decedent's sale of her remainder interest in her Vaparo preferred stock was properly structured, and all values were correctly computed using the prescribed Internal Revenue valuation tables. No other circuit court has decided the issue presented here regarding a properly structured sale of a remainder interest transaction. A review of *Allen*, *Past* and *Gradow* demonstrates that all three cases involved transactions that are factually distinct from the sale of a remainder interest presented in the instant case.

In *Allen*, the decedent gratuitously placed property in a trust retaining for herself a life estate in the property[14]. Years later, the decedent sold her retained life estate for an amount slightly

14. The use of a trust in *Allen*, *Past* and *Gradow*, creates a major distinction from the instant case. In those cases, the fee interest of the subject property was transferred into a trust, and the transferor reserved a life estate in the property transferred into the trust. Under those facts, clearly there has been a transfer of the full fee interest of the subject property into the trust, and under § 2036(a), consideration equal to the value of the transferred fee interest is required. In this case, the Decedent sold only the interest in the remainder of the Vaparo preferred stock, receiving consideration exactly equal to the value of the remainder interest. The Decedent never sold, transferred or otherwise disposed of the life income interest in the Vaparo preferred stock, in contrast to the transferors in *Allen*, *Past* and *Gradow*.

in excess of the fair market value of the retained life estate. In this case, the Decedent did not use a trust, but instead sold the remainder outright, keeping the life income interest. Further, in *Allen* the decedent sold the life estate whereas in this case the Decedent sold the remainder interest.

Past involved a divorce where, pursuant to a settlement, the community property of the decedent and her husband was transferred to a trust wherein the decedent received an income interest for life. The subject transfer in *Past* is the decedent's interest in her share of the community property into trust, in exchange for the life estate in the trust which also contained her husband's share. *Gradow* involved a surviving spouse election under her deceased husband's will to transfer her half of their community property to a trust (and her deceased husband's share would also be transferred to the trust) in exchange for the life estate in the trust. The inapposite facts of *Allen*, *Past* and *Gradow*, and the use of a trust in each of these cases (See *supra*, n.14), vitiate the Commissioner's attempt to demonstrate a conflict among the circuits.

The instant case is the only circuit court decision regarding the tax implication of a properly structured sale of a remainder interest under 26 U.S.C. § 2036(a). Thus, there is no conflict among the circuit courts regarding the issue involved here.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

JAY J. FREIREICH
Counsel of Record
HARVEY R. POE
LAURENCE E. FUNDLER
Attorneys for Respondent
256 Columbia Turnpike
Columbia Commons - Suite 202
Florham Park, New Jersey 07932
(201) 966-2770